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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1230

LA SALLE EXTENSION UNIVERSITY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH CALDERON
Counsel for Petitioner
110 East 59th Street
New York, New York 10022

LINDEN AND DEUTSCH
BELLA L. LINDEN
DAVID BLASBAND
Of Counsel

Dated: February 8, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

LA SALLE EXTENSION UNIVERSITY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of The United States:

The Petitioner, LaSalle Extension University prays that a writ of certiorari issue to review an Order of the United States Court of Appeals for the Seventh Circuit entered on October 23, 1973 which affirmed and directed enforcement of an Order of the Federal Trade Commission dated June 24, 1971, requiring affirmative advertising disclaimers by Petitioner of a specified type size and frequency.

Opinions Below

The Order of the Court of Appeals entered October 23, 1973 which is unreported, is Appendix A hereto. The Order of the Court of Appeals for the Seventh Circuit

entered November 14, 1973 denying a petition for rehearing (unreported) is Appendix B. The Order of the Federal Trade Commission issued June 24, 1971 (unreported) is Appendix C.

Jurisdiction

The Order of the Court of Appeals was entered on October 23, 1973. A timely petition for rehearing was denied by the Order of the Court of Appeals entered November 14, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Questions Presented for Review

1. Did the Court of Appeals err in affirming an Order of the Federal Trade Commission requiring petitioner to affirmatively state, with respect to its correspondence courses of law in all of its advertisements and promotional material, that such courses do not qualify the student for admission to the profession of law, where such disclosure must be made:

   (a) on the cover and on each page wherein a law course is mentioned;

   (b) in type of the same size and appearance as the "advertising claims" appearing on each such page; and (c) in connection with some courses of study which were never before the Commission?

2. Whether said order is arbitrary and involves such practical obstacles to compliance that it constitutes an abuse of administrative discretion.

3. Whether, for the reasons alleged, said order violates petitioner's due process rights.

4. Did the Court of Appeals err in failing to review the applicability of the Federal Trade Commission Order to both the general courses of law study as well as other individual courses:

(a) on the sole ground that the argument for a distinction in the two types of courses had not been made by petitioner to the Federal Trade Commission; and

(b) in the light of the fact that no deceptive practice with respect to other courses of study with law content was alleged by the Federal Trade Commission or was the subject of any evidence or argument in the record.

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the United States Constitution, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. 15 U.S.C. § 45(b) and (c), printed as Appendix D hereto.

3. § 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d), printed as Appendix E hereto.

Statement of the Case

The Court below affirmed an order of the Federal Trade Commission ("Commission") requiring affirmative disclosure of size and frequency which is not only unprecedented, but defies compliance on any practical level. Unless the order is modified, Petitioner will be required to cease offering any instruction in any field of law, not only as to the general law programs which were before the Commission, but also with respect to specialized and single courses which were not before the Commission.

The Order provides, in pertinent part (A-1, pp. 63-65):*

> It Is Ordered that respondent, La Salle Extension University, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of courses of study and instruction, do forthwith cease and desist from failing, in connection with advertisements or promotion of respondent's courses of study in law or of its law degrees, clearly and conspicuously to disclose, in type the same size and appearance as the advertising claims appearing thereon: (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein respondent's law courses or law degress are mentioned and in said promotional material or descriptive brochure on each page on which respondent's law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document; that said courses are not recognized or accepted as sufficient education

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* "A" refers to the Joint Appendix before the Court of Appeals, consisting of Volumes 1, 2-A, 2-B and 2-C.

or legal training to qualify the student to become a candidate for admission to the profession of law in any of the states in the United States or the District of Columbia; provided that respondent may qualify such disclosure by listing the state or states which will accept said courses; and providing further that, if the state or states listed have any additional age, education, preliminary testing, or other legal training requirements, respondent clearly and conspicuously and in immediate conjunction with such list disclose, in type the same size and appearance as the advertising claims appearing thereon, all such additional requirements.

The Petitioner, LaSalle Extension University, is an educational organization which has been offering home study instruction since 1908. It offers courses in such fields as accounting, real estate, business management, hotel management and computer programming. LaSalle has offered two law programs pursuant to which, until recently, it had awarded an LL.B. degree to its graduates under authority of the State of Illinois granted in 1915. Its general 3-year course in law is known as "Law Training for Business Leadership" a non-bar course. LaSalle also offers a 4-year California course which that state accepts as a prerequisite for bar examinations. LaSalle ceased offering any law degree as of September 1, 1973 even in the State of California.

In addition, LaSalle has offered separate specialized individual courses, such as law for appellate conferees of the United States Internal Revenue Service, law for trust officers, law for police officers, and insurance law, pursuant to which no law degrees have ever been offered or awarded. LaSalle has also included a single course in business law as part of its high school and business program, among other courses having no connection with law.

The record below is devoid of any reference to the specialized law courses or the individual business law course.

The instant proceeding was commenced by the Commission's Order to Show Cause dated January 19, 1970 (A-1, p. 63), which made reference to the Commission's 1954 Order* against LaSalle and alleged that since the entry of that order there had been a substantial change of conditions of fact and law in that now, allegedly, no state recognizes LaSalle's course of study in law or law degree as meeting the educational requisite to become a candidate for admission to the practice of law.**

The Commission sought an order prohibiting LaSalle from offering an LL.B. degree and requiring that it affirmatively disclose on all advertisements, enrollment forms, application forms and on each page of its promotional materials and descriptive brochures, in type the size of the largest type appearing thereon, that its courses are not accepted as sufficient education for bar purposes.

After hearing testimony the Hearing Examiner submitted a recommended Order omitting the proposed prohibition against the issuance of a law degree but recommending the disclosure requirements which the Commission ultimately adopted in its Order (A-1, pp. 17-29).

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* The Commission's Order dated June 29, 1954 required LaSalle to cease and desist:

> "* * * from representing, directly or by implication, that recipients of respondent's purported academic degrees in law or others satisfactorily completing respondent's course of study through correspondence will be admitted to or are otherwise eligible to participate in bar examinations, unless such representations are expressly limited to those states (specifically named) wherein the requirements for education and legal training requisite to participating in such examinations are fulfilled solely by completion of a course of legal study through correspondence" (A-1, pp. 17–8; 50 F.T.C. 1083 (954)).

** The allegation is incorrect, as he State of California still recognizes LaSalle's law course as meeting its educational requirements for admission to the bar examination.

Cross-exceptions to the Hearing Examiner's report were filed and argument was held before the Commission. The three majority Commissioners upheld the Hearing Examiner's determination (A-1, pp. 63-74). Two Commissioners dissented on the ground that they would have prohibited the source of confusion—the LL.B. degree (A-1, pp. 75-85).

After the entry of the Order, during the course of a compliance proceeding, the Commission's Compliance Staff took the position that any heading in LaSalle's advertising and promotional brochures, etc., except for the words "LaSalle Extension University" constituted an "advertising claim", requiring disclosure of the same type size on the same page (A-2-C pp. 1070-1075). By this interpretation, LaSalle would be required to include the headline size disclosure on almost every page of its informational brochures and other literature. Further advertising under such self-defeating strictures was futile and the petition to the Court of Appeals followed.

With respect to this size requirement, the Court's decision notes that the disclosure could attract attention without the largest type, but concluded that the Commission's choice "was not outside the range of reasonableness."

With respect to the scope of the Commission's Order the Court acknowledged that the proceedings below were directed at LaSalle's two general law programs (the degree programs) and to no other courses containing law content. However, the Court sustained the application of the Order to specialized law courses on the ground that petitioner had not argued the question before the Commission.

Logic is defied by the Court's contention that petitioner should have foreseen a Commission's interpretation of an order applying it to practices which were not deceptive, not challenged by the Commission's pleading in its Order to Show Cause and not part of the evidence or arguments before the Commission.

REASONS FOR GRANTING THE WRIT

The Order below conflicts with holdings of this Court and decisions of Courts of Appeals that orders of the Commission must bear a reasonable relation to the practice sought to be remedied. *William H. Rorer, Inc.* v. *F.T.C.*, 374 F.2d 622 (CA-2, 1967); *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946); *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *American Home Products Corp.* v. *F.T.C.*, 402 F.2d 232, 237 (CA-6, 1968). As the Court held in *William H. Rorer, Inc.* v. *F.T.C.*:

> "It is incumbent upon the Commission to shape all provisions of its orders realistically to the violation it has found; the cases cited above and the somewhat overbroad order reviewed here indicate it does not always do so" (*supra*, p. 627)

There is no reasonable relation of the broad scope of the Order to the deception sought to be remedied, either with respect to (a) the size and frequency requirements of disclosure, or (b) its application to courses which were not at issue in the proceedings before the Commission.

The ruling of the Court of Appeals that it will not consider legal questions as to the scope of the Commission's order which were not presented to the Commission is a novel ruling which unduly restricts the review jurisdiction of the Courts of Appeals in administrative proceedings.

I. The Size and Frequency Requirement of The Order Bear No Reasonable Relation to The Practice Sought to be Remedied.

It must be emphasized that LaSalle has not been charged with intentional deception in its advertising. The order to show cause which commenced this proceeding alleged that a change of circumstances was the fact that states which

formerly accepted LaSalle's home-study law programs as meeting bar educational requirements now require education at resident institutions.

The evidence adduced by the Commission was exclusively directed to establishing that some members of the public have erroneously equated the obtaining of an LL.B. degree with the right to practice law or sit for bar examinations. On oral argument before the Commission, Commission Counsel stated:

> "Mr. McColgin: We are saying that the tool, the device, by which the people are deceived [the LL.B. degree], and if you take that away, you are not going to have to worry about the salesmen misrepresenting, because there is going to be too great a credibility gap. Without that diploma to show the prospective customers". (Transcript of oral argument before the Commission held on February 23, 1971, pp. 56-57.)

The offering of an LL.B. degree by LaSalle was voluntarily discontinued permanently as of September 1, 1973.

Under any circumstances, the size and frequency provisions of the Order are totally unnecessary to provide the disclosure which would accord full protection to the public against deception or confusion. The absence of any reasonable relationship between the provisions of the Order and the confusion to be remedied is demonstrated by the examples of advertising and promotional material which each prospective student receives from LaSalle. The disclosure language in the size and frequency required by the Commission's order has been appended to these exhibits (see LaSalle Appendix E which was submitted to the Court below).

The Compliance Division interprets the Order to require LaSalle to carry the disclaimer in the same size as the largest heading appearing on each page and in *such*

size on every page referring to a law course or law degree. The exhibit shows that even where LaSalle has reduced the size of its headings by one-third the original size, it has been physically impossible to fit the disclaimer on those pages. (Note: cover of the brochure entitled "Law Training For Business Leaderhip"; advertisements entitled "Now You Can Study Law In Your Spare Time At Home" and "How Law Study Can Benefit You In Your Business Career," LaSalle Appendices E-1, 2 and 3.)

The size requirement alone far exceeds the "clear and conspicuous" standard that the Commission itself has established for years with respect to affirmative disclosure (see pp. 17-18, *infra*);—together with the repetitive factor they are deadly. In the normal course of events, a prospective student may read the headline size disclosure as many as 100 times.

No matter how LaSalle were to devise or revise its advertising or informational literature, the law program would be presented in such a disparaging and disjointed manner that its informational attributes would be completely overwhelmed by the repeated headline warnings. The result may compel LaSalle to discard the entire law study program.

The Commission's intent that prospective LaSalle students should be apprised that they will not be eligible to sit for bar examinations upon completion of either of the two full law programs, would be completely satisfied if the Order were modified to provide for a clear and conspicuous disclosure on all advertisements, enrollment forms and contracts and on the cover or second page of informational and promotional brochures. The Court of Appeals was furnished with LaSalle Appendix D, which consists of a portion of the promotional materials which prospective LaSalle students will receive before enrolling in a course, to which Petitioner has appended the disclosure in a clear and conspicuous manner. As so modified, the Court will

note that the disclosure is displayed clearly and conspicuously some 23 times.

It is respectfully submitted that no prospective student in the LaSalle program could possibly suffer any deception as to its limitations if the Order is modified to provide for reasonable disclosure.

II. Petitioner Has Been Denied Due Process Of Law.

The Commission Order, according to Commission Counsel, applies to single law courses which were not in any manner the subject of the proceeding below, which was directed to general law study leading to a degree.

Disclosure must be made with respect to a single "business law" course among 26 other courses in LaSalle's high school program having nothing to do with the law. Aside from the fact that such a broad injunction bears no reasonable relation to the practice sought to be remedied, the sanction with respect to such non-degree programs would violate Section 556(d) of the Administrative Procedure Act which provides in pertinent part:

> "(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. * * * A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. * * *"

The order insofar as it applies to individual and specialized non-degree courses was not supported by any evidence whatsoever. Indeed such courses were not referred to or placed in issue by the order to show cause; no charges were made concerning them in the entire course of the proceedings; there was no testimony concerning them, nor were

they the subject of any findings or conclusions, nor mentioned in the opinion of the Commission.

In short, there was nothing before the Commission which could in any manner support the extension of the disclosure requirements to non-degree courses. The record below is barren as to their content, method of marketing or promotion. Indeed, the lack of interest of the Commission Counsel in non-degree courses is exemplified by the following colloquy on oral argument before the Commission:

> "Commissioner Jones: You don't want to stop them from issuing some kind of diploma or degree which can encompass a business law course?
>
> Mr. McColgin: No. The only theory that you can follow on through on [sic] is the professional degrees." (Transcript of oral argument of February 23, 1971, p. 57).

In *Bendix Corp.* v. *FTC,* 450 F.2d 534 (6th Cir., 1971) the Court vacated a Commission order and remanded the case where the matter was decided on a theory that was not placed in issue by the complaint. The Court held that the order violated the Administrative Procedure Act:

> ". . . when it [the Commission] decided the case on a theory of illegality which was never charged, raised nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner and not raised as an issue or discussed by complaint counsel in the appeal to the Commission . . ." (*Supra,* p. 537).

In *L. G. Balfour Co.* v. *FTC,* 442 F.2d 1 (7th Cir., 1971) the Court reversed an order of the Commission insofar as it depended upon a finding which was unsupported by an allegation in the complainnt. The *Balfour* case was cited in *Golden Grain Macaroni Co.* v. *F.T.C.,* 472 F.2d 882, 886

(9th Cir., 1972) for the following rule:

> ". . . If an issue was not litigated, and the party proceeded against was not given an opportunity to defend himself, an adverse finding on that issue by the agency does violate due process."

It has been held in *Robertson* v. *F.T.C.*, 415 F.2d 49, 52 (4th Cir., 1969) that the requirements of procedural due process under the FTC Act and the Administrative Procedure Act, as well as the rules of the Commission, apply not only to adjudications of fault "but also to formulation of remedies in cease and desist orders", citing *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946).

III. The Ruling of the Court of Appeals That It Would Not Consider A Legal Argument Not Presented Before the Commission Is an Unwarranted Limitation on the Statutory Review Jurisdiction of the Courts of Appeals.

The Court of Appeals has adopted a principle of far reaching significance to federal administrative law. The effect of any administrative order cannot be fully known before its text is issued and, in some cases, presented for compliance to the Agency staff. To require every legal objection to such an order to have been foreseen and presented before the Agency is an effective shifting of the burden of justification and proof from the complainant Agency to the respondent.

The function of the Court of Appeals in administrative review is precisely to consider questions of law, not facts to which the Agency's expertize has been applied. Any limitation of such review on law principles by the Courts of Appeals raises a fundamental question which merits consideration and resolution by the United States Supreme Court.

Hormel v. *Helvering*, 312 U.S. 552 (1940) states a broader rule for the consideration by the Court of Appeals of legal questions that were not pressed nor passed upon by the administrative agency below. This Court there indicated that such a rule of appellate practice must yield to the interests of justice and to the statutory authority of review granted to the Court of Appeals (See Federal Trade Commission Act, 15 U.S.C.A. § 45(c)). The "particular circumstances" of the record in the instant proceeding required the Court of Appeals to consider and rule upon the contention of legal error inherent in the broad scope of the Commission's order, which encompasses specialized courses not connected to the general study of law. The determination that the Commission's order required a disclaimer as to courses which were not related to general law study introduced an element of surprise so far as the issues had been delineated and tried before the Hearing Examiner. The principle set forth in *Hormel* v. *Helvering*, *supra*, should have led the Court of Appeals in the instant case to either rule on this question or remand the proceeding for additional evidence. (15 U.S.C.A. § 45(c)).

In the present case, furthermore, the record shows that the petitioner's argument in the Court of Appeals against the broad scope of the Commission order could not reasonably have been seen to be a necessary argument before the Commission within the pleading framework established by the allegations of its order to show cause.

The Court of Appeals affirmed the extension of the Order to non-degree courses. The Court noted the argument of Commission Counsel, expressed for the first time on appeal, that there would be difficulty in making a distinction in the Order "between offerings where deception with respect to eligibility for bar admission will be a problem and those where it will not". Such an argument, even if correct (which it is not), is simply a post-hoc rationalization for an order which has no other substantiation. As this Court

held in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962):

> "The courts may not accept appellate counsel's post-hoc rationalizations for agency action; Chenery [SEC v. Chenery, 332 U.S. 194] requires that an agency's discretionary order must be upheld, if at all, on the same basis articulated in the order by the agency itself:
>
> A simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . ."

The Commission itself set forth no grounds whatsoever during the entire course of the proceedings before it to support the extension of the disclosure requirements to any courses other than the two degree programs before it. No other courses were even mentioned before the Commission except for the colloquy quoted, *supra*, page 12.

The Court of Appeals affirmed on the ground that the petitioner did not raise the non-degree course issue before the Commission. It is respectfully submitted that such a holding negates § 556 of the Administrative Procedure Act, which provides:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

The rationale of the Court below would change the above rule and place the burden of proof on the opponent of the proposed order. In the instant case, there being no evidence or charge with respect to any courses of study except for the two degree programs, it is clear that the

Commission has not sustained the burden of proving that the Order should apply to other courses of study, if it ever intended that result in the first place.

As this Court stated in connection with an order of the Interstate Commerce Commission:

> "There are no findings and no analyses here to justify the choice [of remedy] made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Jacob Siegel Co.* v. *Federal Trade Com.*, 327 U.S. 608. . . . Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Burlington Truck Lines* v. *U.S.*, *supra*, p. 167.

IV. The Application of the Order to Courses of Study Which Were Not Before the Commission Constitutes an Abuse of Administrative Discretion.

There is no relation, reasonable or unreasonable, between the sweeping language of the Order and the multiplicity of law courses offered by LaSalle. Moreover, no reason whatsoever would exist for the disclosure provisions if LaSalle no longer offers or grants an LL.B. or any other law school degree. Nowhere in the record is there any evidence that confusion could exist in connection with LaSalle's existing non-degree courses.

The Commission has never made any such claim, nor has it set forth any basis for requiring that the Order

apply to any course for which a law degree is not offered or awarded.

Purportedly the confusion giving rise to this proceeding has resulted from the contention that the LL.B. degree has been for many years equated with the right to practice law or sit for bar examinations. Except for the two programs which were before the Commission, none of the other individual and specialized law courses, such as Claim Adjusting Law, Law for Trust Officers or a single business law course which is part of the high school program, were accompanied by any law degree. To require Petitioner to disclose that the passing of such individual courses would not render a student eligible to take bar examinations would be absurd and should be stricken as bearing no reasonable relation to the practice sought to be remedied. *Jacob Siegel Co.* v. *F.T.C.*, *F.T.C.* v. *Royal Milling Co.*, *William H. Rorer* v. *F.T.C.*, *supra*.

V. The Order Is Unprecedented and Discriminatory.

In requiring disclosure of headline size and each page frequency, the Commission has inexplicably departed from its own standards which it has for years deemed appropriate and sufficient for the protection of the public. Since the case of *Haskelite Mfg. Corporation* v. *F.T.C.*, 127 F.2d 765 (7th Cir. 1942), the courts have affirmed the Commission's right to require disclosure of the limitations of products or services. However, such orders required that the disclosure be "clear" or "clear and conspicuous" "in connection with" and "in immediate conjunction with" the product or service involved. *Ward Laboratories, Inc.* v. *F.T.C.*, 55 F.T.C. 1337, 1364, *affd.* 276 F.2d 952 (CA-2), *cert. denied* 364 U.S. 827 (1960); *Portwood* v. *F.T.C.*, 418 F.2d 419, 421-423 (CA-10, 1969); *J. B. Williams Co.* v. *F.T.C.*, 381 F.2d 884 (CA-6, 1967), 68 F.T.C. 481, 554; *Keele Hair & Scalp Specialists, Inc.* v. *F.T.C.*, 275 F.2d 18 (CA-5, 1960);

Feil v. *F.T.C.*, 285 F.2d 879, 881, 901-02 (CA-9, 1960); *L. Heller & Son* v. *F.T.C.*, 191 F.2d 954, 956 (CA-7, 1951); *Wybrant System Products Corp.*, 54 F.T.C. 1681, 1696, *aff'd.* 266 F.2d 571 (CA-2, 1959); *Erickson* v. *F.T.C.*, 272 F.2d 318, 320 (CA-7, 1959).

Even more recently, the Commission has continued to seek and obtain orders under its consent order procedure (16 C.F.R. 2.31, *et seq.*) with disclosure requirements couched in terms of "clear and conspicuous" and "in immediate conjunction with."

Kenrec Sports, Inc., C-2226, 37 Fed. Reg. 13079 (1972); *Lorillard, A division of Loew's Theatres, Inc.*, C-2180; *Philip Morris, Inc.*, C-2181; *American Brands, Inc.*, C-2182; *Brown and Williamson Tobacco Co.*, C-2183; *R. J. Reynolds Tobacco Co.*, C-2184; *Liggett & Meyers, Inc.*, C-2185, 37 Fed. Reg. 9108 (1972); *Medi Hair International*, Docket C-8830, 37 Fed. Reg. 10351 (1972); *Titan Enterprises*, C-2173, 37 Fed. Reg. 7786 (1972); *The Credit Bureau of Washington, Inc.*, C-2113, 37 Fed. Reg. 2775 (1972); *J. B. Williams Co., Inc.*, C-2037, 36 Fed. Reg. 23869 (1971); *Proctor & Gamble Company*, C-1901, 36 Fed. Reg. 11291 (1971); *Colgate Palmolive Co.*, C-1900, 36 Fed. Reg. 11283 (1971); *Lever Brothers Company, Inc.*, C-1899, 36 Fed. Reg. 11287 (1972).

The Commission has failed to elicit any evidence or submit any rationale for its severe departure in the instant proceeding from the disclosure requirements which, for many years, it has found adequate for the protection of the public. Significantly the requirements of the Order even extend far beyond the disclosure requirements which the Commission has sought in connection with products whose use creates dangers to health and safety. See *H-S Enterprises Inc.*, C-2107, File No. 702 3006 (October, 1971) (paint disintegrators, flammable and irritating); *Firestone Tire & Rubber Co.*, F.T.C. Docket No. 8818 (false safety

claims for tires); *Ecology Corporation of America,* File No. 712 3679 (1972) (detergent a hazardous substance).

LaSalle's home study program performs an educational service for thousands of Americans who do not possess the means or time to attend resident colleges or schools. In this context the acquisition of a background knowledge of law has never been questioned by the Commission. It is respectfully submitted that there exists no rationale for the Commission to have granted an Order which is far more onerous than required to protect the public and which jeopardizes the continuance of an established educational enterprise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH CALDERON
Counsel for Petitioner
110 East 59th Street
New York, New York 10022

LINDEN AND DEUTSCH
BELLA L. LINDEN
DAVID BLASBAND
Of Counsel

Dated: February 8, 1974.

APPENDIX A

Order of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 23, 1973.
(argued January 8, 1973)

Before

HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge

Petition to review Order of Federal Trade Commission.

No. 71-1648

LA SALLE EXTENSION UNIVERSITY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ORDER

Petitioner, La Salle Extension University, is a proprietary institution, providing instruction by correspondence. In 1969, 10% of its 100,000 students were taking courses in the field of law. Its gross receipts were $50,000,000, those from sale of its complete law courses $3,300,000. In 1954 a Commission order had required petitioner to cease "repre-

senting, directly or by implication, that recipients of [petitioner's] purported academic degrees in law or others satisfactorily completing respondent's course of study through correspondence will be admitted to or are otherwise eligible to participate in bar examinations . . ." except for some four states where correspondence study was then acceptable.

The Commission reopened the proceeding in 1970. An examiner heard evidence tending to show that individuals who relied upon petitioner's advertising concluded that completion of petitioner's law course would be an acceptable educational prerequisite for admission to the bar. The examiner and subsequently the Commission (by a three to two vote) rejected the staff proposal that petitioner be prohibited from offering a law degree, but an order, unanimously adopted, entered June 24, 1971, required petitioner in substance, "clearly and conspicuously to disclose, in type the same size and appearance as the advertising claims appearing thereon: (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein respondent's law course or law degrees are mentioned and in said promotional material or descriptive brochure on each page on which respondent's law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document; that said courses are not recognized or accepted as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law. . . .", except for appropriate qualification as to any state which will accept such courses. The disclosure in the form petitioner intends to use is: "No state accepts any law home study course, including La Salle's, as sufficient education to qualify for admission to practice law."

Appendix A.

(1) Petitioner now says it is willing to abandon offering a law degree, takes the position that any possible misunderstanding which might require the disclosure results from the offering of a law degree, and proposes that we modify the order so as to require disclosure only so long as petitioner offers a law degree. Petitioner's material, however, repetitively emphasizes and promotes with seeming effectiveness the advantages of the "study of law" and "law training." Dropping the references to a law degree would, we think, change the tone very little. We are far from able to say, as a matter of law, that the probability of misunderstanding would be materially reduced if there were no promise of a degree. The two commissioners who felt that dropping the degree should be part of the solution, supported the requirement of disclosure in any event.

(2) Petitioner challenges the requirement that the disclosure appear on each page of promotional material or descriptive brochure on which law courses or law degrees are mentioned. It argues that such frequency is unreasonable. The Commission considered the argument and said that it "might be persuasive if we had reason to believe that prospective purchasers generally read each page of [petitioner's] promotional literature before purchasing." It concluded, however, that the each-page requirement was necessary to protect "the 'ignorant, the unthinking and the credulous,' who may base their decision to purchase on a cursory perusal of the literature at hand."

It is well-established that deference must be accorded to the expertise of an administrative agency, particularly with respect to the appropriateness of remedies.

The Supreme Court has stated "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a

way as to execute its policy efficiently and economically." *Moog Industries Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). In each case, the court must determine whether the remedy bears "no reasonable relation to the unlawful practices found to exist," *Jacob Siegal Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946), or whether it is too restrictive, forbidding activities other than those "which if continued would directly aid in perpetuating the same old unlawful practices." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 727 (1948). See *L. G. Balfour Company* v. *F.T.C.*, 442 F.2d 1 (7th Cir., 1971); *Spiegel, Inc.* v. *F.T.C.*, 411 F.2d 481 (7th Cir., 1969). We are unable to say that the Commission's decision as to frequency of disclosure was outside the range of reasonableness.

(3) The most difficult problem is posed by the requirement that the disclosure must not only be clear and conspicuous, but "in type the same size and appearance as the advertising claims." Evidently this means the same size and appearance as the largest type used for any word of an advertising claim. The compliance staff so interprets it, and the Commission said, in its opinion, "We note that in certain promotional material [petitioner's] practice is to use the word "LAW" in large letters with the text of the ad in much smaller letters. Surely a prospective purchaser is entitled to be informed that the course will not qualify him to take the bar examination in letters equally as large as the letters which we find, on the basis of the record, convey this meaning."

Although petitioner argues that the requirement that the disclosure be clear and conspicuous is enough, we have no doubt that the Commission may properly particularize that requirement as to size and appearance of type. See *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512

(7th Cir., 1946); and *Gimbel Bros.* v. *Federal Trade Commission*, 116 F.2d 578, 580 (2d Cir., 1941).

Petitioner points out that it would be impossible, in some instances, and extremely awkward in others, to print the 20 word disclosure in the same size type as the word "law" or other emphasized word as it appears in its present advertising. The solution offered in the Commission opinion was that petitioner could alter the layout of its material. So put, the requirement is that in laying out each page of material, the designer must select the largest size type he considers appropriate for the disclosure and then design the balance so that no word of an advertising claim will be in larger or more distinctive type than the disclosure.

It would seem possible to design a page of advertising so that the disclosure would attract attention even though larger type were used for some portion of the other material. On the other hand, testimony of record indicates that part of the problem before the Commission arose from deceptive oral promotional efforts by respondent's sales representatives. Bluntly obvious disclosure in the printed matter may be needed to render oral deception more difficult. On balance, a majority of this division of the court concludes that the Commission's choice was not outside the range of reasonableness.

(4) Another problem arises out of the fact that petitioner offers two types of course of study in law. The language of the order is broad enough to cover both.

One type of course of study in law results, when successfully completed, in conferral of an L.L.B. degree. Petitioner also offers specialized courses such as insurance law, claim adjusting law, law for trust officers, law for appellate conferees (I.R.S.), and law for police officers. The order applies "in connection with advertisements or promo-

tion of respondent's courses of study in law or of its law degrees."

Petitioner contends here that the problem before the Commission arose out of offerings of the general courses and that the disclosure will accomplish nothing when made in material concerning the offerings of the specialized courses. It does seem fair to say that the proceeding was mainly directed at promotion of the general courses, although counsel for the Commission points out the difficulty of making a distinction in the order, valid in the future as well as presently, between offerings where deception with respect to eligibility for bar admission will be a problem and those where it will not.

In any event petitioner raised no such question before the Commission, even incorporating the broad language in a form of order proposed by petitioner. Ordinarily a reviewing court should not set aside an administrative order upon a ground not raised before the agency. 3 Davis, Administrative Law § 20.06. The circumstances do not call for a departure from that principle.

The order of the Commission is affirmed and will be enforced.

APPENDIX B

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
November 14, 1973.

Before
HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOHN PAUL STEVENS, Circuit Judge

Petition for Review of an Order of the Federal Trade Commission.

No. 71-1648

LA SALLE EXTENSION UNIVERSITY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

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APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

Docket No. 5907
In the Matter of

LA SALLE EXTENSION UNIVERSITY,
a corporation

Order

This matter has been heard by the Commission on exceptions filed by respondent and counsel supporting the complaint from the recommended findings, conclusions and order of the hearing examiner, filed October 19, 1970. The Commission has determined that the exceptions should be granted in part and denied in part, and that the recommended findings of the hearing examiner, modified to conform with this opinion, should be adopted as those of the Commission. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the recommended order entered by the hearing examiner should be amended. Accordingly,

The Commission being of the opinion that the public interest will best be served by modifying its order of June 29, 1954:

IT IS ORDERED that the hearing examiner's recommended Finding 6 be, and it hereby is, amended to read:

The advertisements, in the form of matchbook, newspaper or magazine ads, usually only advertise law train-

ing or the fact that respondent grants an LL.B. degree and fail to set forth the fact that completion of these courses does not qualify anyone to take the bar examination or practice law in any of the 50 states of the United States or the District of Columbia.

IT IS FURTHER ORDERED that, as amended herein, the recommended findings of the hearing examiner be, and they hereby are, adopted as the findings of the Commission.

IT IS FURTHER ORDERED that the Commission's order of June 29, 1954, be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent, La Salle Extension University, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of courses of study and instruction, do forthwith cease and desist from failing, in connection with advertisements or promotion of respondent's courses of study in law or of its law degrees, clearly and conspicuously to disclose, in type the same size and appearance as the advertising claims appearing thereon: (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein respondent's law courses or law degrees are mentioned and in said promotional material or descriptive brochure on each page on which respondent's law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document; that said courses are not recognized or accepted as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law in any of the states in the United States or the District of Columbia;

provided that respondent may qualify such disclosure by listing the state or states which will accept said courses; and provided further that, if the state or states listed have any additional age, education, preliminary testing, or other legal training requirements, respondent clearly and conspicuously and in immediate conjunction with such list disclose, in type the same size and appearance as the advertising claims appearing thereon, all such additional requirements.

IT IS FURTHER ORDERED that respondent herein shall, within sixty (60) days after service upon it of this Order, file with the Commission a report in writing setting forth in detail the nature and form of its compliance with this Order.

By the Commission. Chairman Kirkpatrick and Commissioner Jones filed separate opinions.

SEAL

/s/ CHARLES A. TOBIN
Charles A. Tobin
Secretary

ISSUED: June 24, 1971

ATTACHED ARE: (1) Opinion of the Commission by Commissioner Dixon

(2) Separate opinions by Chairman Kirkpatrick and Commissioner Jones

Appendix C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

Docket No. 5907

In the Matter of
LA SALLE EXTENSION UNIVERSITY,
a corporation

Opinion of the Commission

By Dixon, Commissioner:

This matter is before the Commission on exceptions filed by counsel supporting the complaint and respondent from the hearing examiner's recommended findings, conclusions and order, filed October 19, 1970. A Commission order, issued June 29, 1954, prohibits respondent from representing that recipients of its "purported academic degrees in law or others satisfactorily completing respondent's course of study through correspondence will be admitted to or otherwise eligible to participate in bar examinations unless such representations are expressly limited to those states . . . wherein the requirements for education and legal training requisite to participation in such examinations are fulfilled solely by completion of a course of legal study through correspondence."

The Commission, citing its understanding that respondent continues to offer for sale a correspondence course of study in law and continues to confer a purported academic degree of bachelor of law (LL.B.), and its further understanding that no state recognizes respondent's course of study or degree as meeting the minimum education and

legal training requisite to becoming a candidate for admission to the profession of law, issued, on January 19, 1970, an order to show cause why the 1954 order should not be modified. The proposed order would have respondent affirmatively disclose that its courses of study are "not recognized or accepted as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law in any of the States in the United States or the District of Columbia; provided that, respondent may qualify such disclosure by listing those states which will accept said courses if additional education and legal training requirements are met; and provided further, that respondent clearly and conspicuously and in immediate conjunction thereto disclose all such additional requirements." The proposed order also would proscribe the conferring of or offering to confer an LL.B. or any other law degree by respondent.

Respondent filed an answer to the order to show cause, and, as the answer raised substantial factual issues, the Commission issued a further order, on February 27, 1970, reopening the proceeding and directing hearings for the receipt of evidence pursuant to Section 3.72(b)(3) of the Commission's Rules. After hearings and the filing of proposed findings and briefs by the parties, the examiner filed his recommendations.

No findings were recommended by the examiner, nor where they proposed by the parties, as to the general background of respondent's business. However, the record is clear in this regard.

Respondent, an Illinois corporation, is a proprietary institution, providing instruction by correspondence in numerous courses of study. In 1969, its overall enrollment exceeded 100,000 students, 10,088 of whom were taking courses purportedly relating to the study of law. In descending order of the number of students enrolled, respondent's leading courses are accounting, high school [illegible]puter planning, interior decorating, law, business man-

agement, and hotel/motel management. La Salle's total revenue from the sale of all its courses, in 1969, was approximately $50,000,000; its gross receipts from the sale of its "complete law courses" were $3,332,750. The "complete law courses" are a three-year course, which cost $550 and consists of 89 lessons, and a four-year course, costing $695 and consisting of 109 lessons. Upon the completion of either of these two courses, respondent confers a bachelor of law degree (LL.B.). No state recognizes the degree as qualifying its recipients as candidates for admission to its bar. California accepts four-year correspondence courses, including respondent's, if the recipient meets several other qualifications.

The examiner found that respondent, in its advertisements, "failed to set forth fully and conspicuously that completion of its three-year [course] does not qualify anyone to take a bar examination or practice law in any of the 50 states of the United States or the District of Columbia," and that in its advertisements respondent usually advertised that its courses of study provided a legal education and could lead to a law degree, but failed to disclose the limited utility of the degree and course of study.

With these findings as a basis of support, the examiner recommended the conclusion that respondent's advertisements and promotional material are deceptive as they represent falsely that "students who complete its course of study in law and receive its law degree (LL.B.) are thereby eligible to participate in bar examinations or to become practicing lawyers in their respective states." The examiner's recommended order would require respondent to make an affirmative disclosure with the same wording proposed in the order to show cause.

Respondent does not take exception to the examiner's recommendation that the order require that disclosure be made, nor does it take exception to the wording of the disclosure. It objects strenuously, however, to the provisions

requiring that disclosure be made "in type the same size and appearance as the advertising claims appearing thereon," and that the disclosure appear "on the front page or cover and on each page of any promotional material or descriptive brochure wherein respondent's law courses or degrees are mentioned."

The Type-Size Provision: Respondent questions whether it is necessary in the order to be more precise than to require that the disclosure be clear and conspicuous. But even if a specific provision is to be included, respondent argues, further, that requiring the disclosure to be the same size as the largest advertising claim is unreasonable.

Generally, to lessen the opportunity for misconstruction and misinterpretation of orders, the Commission strives to describe, with as much precision as is feasible, what will constitute compliance. This is clearly of the utmost importance when misconstruction can lead to a violation of the order and penalty proceedings. Imprecision, for that matter, can be fatal to the validity of an order. In *Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367-368 (1965), the Court said that "the severity of possible penalties prescribed . . . for violations of orders which shall have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

With this in mind, we turn to the question of the reasonableness of the type-size provision. To reiterate, respondent does not dispute the examiner's finding that its representation that it was offering a course in the study of law led purchasers to believe that they could qualify for admission to the bar. This was deceptive, as no state except California recognizes correspondence courses for this purpose. Where, as here, the mere offering of the product or service leads to deception (without further affirmative claims), we believe that it is reasonable and necessary to demand that a dis-

closure required to dispel the deception be given equal prominence with the offer. We note that in certain promotional material, respondent's practice is to use the word "LAW" in large letters with the text of the ad in much smaller letters. Surely a prospective purchaser is entitled to be informed that the course will not qualify him to take the bar examination in letters equally as large as the letters which we find, on the basis of the record, convey this meaning.[1]

Further specific arguments as to the unreasonableness of the type-size provision were advanced by respondent. Respondent argues that the type-size provision presents problems of indefiniteness and, also, that "in most cases it will be physically impossible with the existing layout designs to fix, in largest matching print, the rather lengthy disclosure required by the recommended order." Respondent also contends that the type-size provision will not assure the visability of the disclosure. To support this argument, respondent imagines an advertisement in which all print is uniformly small so that the matching disclosure would "get lost in the crowd."

We agree with complaint counsel that the type-size provision cannot be considered unreasonable for the reason that it may require respondent to alter the layout of its advertisements. Unlike trademarks or trade names, advertising layouts are generally of transitory value; they rarely, if ever, can be said to constitute a valuable business asset which the Commission would endeavor to preserve if feasible. Moreover, it is well settled that if there is no way to present the claim in a particular medium without making a false representation, the seller must abandon the use of that medium. *Federal Trade Commission* v. *Colgate-Palmolive Co., et al.*, 380 U.S. 374 (1965).

Similarily, we reject respondent's contention that the type-size provision is unreasonable because it is indefinite. Al-

[1] The proposed order in the order to show cause provided that the disclosure be made in "type as large as the largest type appearing thereon." As the words in the promotion set in the largest type may not be advertising claims (*e.g.*, in CX 77, "La Salle Extension University" is in the largest type), the examiner's recommended order in this respect is less demanding.

though its argument is not entirely clear, respondent seems to base this assertion on the fact that the disclosure will vary among advertisements to the extent that the size of advertising claims vary from one advertisement to another. Whatever the basis for respondent's position, its argument is wholly without merit. Quite clearly, the type-size provision makes the order more definitive, while giving respondent some flexibility in composing its advertisements.

As to the contention that respondent could devise an advertisement with uniform and small-size print so that the disclosure would get "lost in the crowd," it is unlikely that respondent would find that it was to its advantage to compose such an ad, for the promotional claims would also be lost. Irrespective of this, the order, by including this specific provision, does not excuse respondent from complying with the broader "clear and conspicuous" requirement. Respondent's advertisements must, in short, be both of the type-size designated and also clear and conspicuous.

In summary, neither respondent's arguments nor our examination of the record shows that the type-size provision is unreasonable or not feasible. We therefore sustain the examiner's recommended order as to the type-size provision.

The "On Each Page" Provision: In support of its principal contention that the "on each page" provision is "unnecessarily onerous," respondent points out that its promotional material includes multi-page pamphlets relating to courses other than law. Respondent believes that under the wording of the order, it would be required to make the disclosure in such a pamphlet on each page, even though the page made no reference to law degrees or law courses. And even as to those materials devoted exclusively to its purported "courses of law," respondent contends that the number of pages are so numerous and hence the number of disclosures would be so great, that it would be unnecessarily redundant and degrading, and that the impact would be dulled, if it were required to make the disclosure on each page. Specifically, respondent recommends a provision that would require that the disclosure appear "clearly and con-

spicuously . . ., with such clarity as is likely to be observed and read, . . . in connection with the mention of respondent's law courses or law degrees in any promotional material or descriptive brochure."

To respondent's argument that the examiner's recommended order would require disclosure on pages not referring to its law degrees or courses of law, complaint counsel contend that respondent has misinterpreted the order, that it is clear that the disclosure need be made only on pages "wherein law courses or law degrees are mentioned." As this conflict between complaint counsel and respondent indicates, the order is somewhat equivocal, and requires clarification. In any event, this conflict of interpretation does not bear upon the essential question, whether this provision should, stripped of any ambiguity, be included in the order.

Respondent's argument that a disclosure on each page will be redundant and degrading might be persuasive if we had reason to believe that prospective purchasers generally read each page of respondent's promotional literature before purchasing.[2] That some purchasers may do so is not controlling. It is more important that others may not, since the Commission's efforts are directed at protecting not only the most careful and intelligent buyers, but also the "ignorant, the unthinking and the credulous," who may base their decision to purchase on a cursory perusal of the literature at hand. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (2nd Cir. 1944). From our examination of respondent's promotional brochures, any page of which may induce purchase of respondent's course, we find that its argument in this regard is without merit.

We consider next complaint counsel's contention that the examiner erred in failing to include in the recommended order a provision preventing respondent from conferring

[2] Cf. *Bantam Books, Inc.* v. *Federal Trade Commission,* 275 F. 2d 680 (2nd Cir. 1960), where the court upheld a Commission order requiring a disclosure that respondents' books were abridged appear on the front cover and upon the title page of its books. In that matter, there was evidence that buyers of books almost invariably looked at either of these two places before purchasing.

or offering to confer an LL.B. or other law degrees. The examiner based this exclusion on his conclusions that the question of what degrees, if any, can be offered or conferred by respondent is a matter of Illinois law and that if a clear explanation or disclaimer accompanied respondent's advertisements pertaining to law degrees, no deception in their regard would be possible.

We do not concur in that part of the examiner's holding which suggests that the Commission is powerless to prevent deception if the source of the deception has been approved by state law. To the contrary, we believe that our authority to prevent a deceptive trade practice in commerce would transcend a state law which may appear to sanction that practice.

However, since there is nothing in the record or in complaint counsel's brief to indicate that the conferring of an LL.B. degree would have the capacity or tendency to deceive the prospective student in any manner other than by conveying the false impression that the recipient of the degree would be qualified to become a candidate for admission to the profession of law and since the disclosure required by our order would dispel this deception, we agree with the examiner that a separate provision in the order prohibiting the conferring of the degree is not warranted on the basis of this record.

The offering of an LL.B. degree may, of course, lead the prospective student to believe that upon receipt of such degree he would be qualified to take a state bar examination. We note, in this connection, that in its initial contact promotions respondent uses small ads, *e.g.*, matchbooks. Since it is possible that respondent may represent in such ads that it offers an LL.B. degree, without specific reference to its courses, we will amend the examiner's order to require that the disclosure be made both as to the courses and to the LL.B.

The remaining exceptions can be quickly disposed of. Complaint counsel argue that the Commission order should require that respondent make the affirmative disclosure in

oral offers to sell, as well as written offers, so solicitations by respondent's salesmen would be covered by the order. Since, by our order, the disclaimer will appear on each page of respondent's promotional material, and in prominent size, it appears that interested consumers will be exposed to the disclaimer. Therefore, no further requirement as to the disclosure is necessary and we reject complaint counsel's exception in this regard. The order, however, will be changed to clarify any ambiguity as to this provision.

Respondent takes exception to the examiner's recommended Finding 6, which reads:

> "The advertisements, in the form of matchbook, newspaper or magazine ads, usually only advertise law training or the fact that respondent grants an LL.B. degree and fail to set forth the fact that respondent's courses are of *no value* for anyone who wishes to practice law." (Emphasis added.)

The record in the instant matter relates to the question whether respondent's courses of study qualified its recipients for the bar examination, and does not deal with the question of the courses' value to those individuals who wish to practice law. Hence, Finding 6 will be changed, as suggested by respondent, to read:

> "The advertisements, in the form of matchbook, newspaper or magazine ads, usually only advertise law training or the fact that respondent grants an LL.B. degree and fail to set forth the fact that completion of these courses does not qualify anyone to take the bar examination or practice law in any of the 50 states of the United States or the District of Columbia."

As modified herein, the findings recommended by the hearing examiner are adopted as the findings of the Commission. An appropriate order will be entered.

Chairman Kirkpatrick and Commissioner Jones filed separate opinions.

June 24, 1971

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

Docket No. 5907

In the Matter of
LASALLE EXTENSION UNIVERSITY,
a corporation

Separate Opinion of Chairman Kirkpatrick

I am in complete agreement with the majority with respect to the necessity and propriety of modifying the order in this case so as to require a clear and conspicuous disclosure, in all written promotional material, of the limited utility of respondent's course of instruction, in terms of qualification for admission to the profession of law. However, I am unable to agree with the conclusion that this disclosure requirement will be sufficient to fully protect consumers from misleading impressions concerning respondent's course of instruction. I believe that a prohibition on conferring or offering to confer law degrees is an essential supplement to the disclosure requirement.

Assuming that the required disclosure would be fully adequate in the absence of any *oral* promotional efforts, it seems to me that any corrective function served by a written disclosure in this case is susceptible to substantial dilution, if not complete obliteration, by means of representations made by respondent's salesmen, who make personal visits to the homes of consumers responding to advertisements. The majority has modified the examiner's order so as to make clear that the required disclosure provision is

not applicable to *oral* offers to sell. I am not disturbed by this change, because required disclosures in oral presentations are largely unenforceable in any practical sense. But that is no reason to abandon any effort to deal with deception in oral presentations. LaSalle's continued ability to offer and confer law degrees would be an effective "selling point" in oral presentations, and thus would continue to be a potentially powerful instrument of deception on the part of respondent's salesmen. I think the Commission can and should deal with this problem by prohibiting LaSalle from granting or conferring any law degree.

The record is replete with evidence of misleading impressions created by sales representatives in the course of their presentations and in answers to questions posed by consumers. Several witnesses testified as to their interest in becoming lawyers, and as to their belief—fostered by the oral representations of LaSalle's representatives—that the LaSalle course would enable them to achieve this goal by receiving a law degree at the end of respondent's course. *See, e.g.*, the testimony of Messrs. Mitchell (Tr. 71),[1] Zersen (Tr. 89-90, 93-94),[2] Allen (Tr. 470, 475, 478),[3] Coppolino

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[1] *Question:* Do you recall anything more specific that she [the Sales Representative] told you about that course at that time?

Witness: Yes, she said I would obtain a LLB degree and that I would be eligible for the bar exam, and all I had to do was have the ambition to take the bar exam and the money to open an office afterwards.

Question: Did you get an impression of what the law degree was at the time she described it to you?

Witness: The way it was described to me, I believe it was a regular lawyer's degree that I would be able to take the bar exam and become a lawyer.

[2] *Question:* Mr. Zersen, after your visit with the salesman, what was your impression with respect to the law degree offered by LaSalle?

Witness: That I still could become a lawyer in the State of Nebraska.

Question: Did you then enroll?

Witness: Yes, I did.

Question: And for what purpose did you enroll in the course?

Witness: So that I could become a lawyer.

[3] *Witness:* Then I asked him [the LaSalle Salesman] could I actually practice law in the State of New Jersey, and he said yes. Thereupon, he stated that if I

Appendix C

(Tr. 493-497),[4] Bailey (Tr. 571-573),[5] and Cooper (Tr. 611-612).[6]

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decided to move, all it would require is sitting for the bar in that particular state and I would be able to practice law there, too.

* * * * *

Question: For what reason did you threaten to file a suit against LaSalle?

Witness: I felt that they had misrepresented, that the salesman had misinformed me with regard to obtaining a legal education to practice law . . .

* * * * *

Question: At any time, did you consider leaving your state, the State of New Jersey, to practice law in any other state?

Witness: No. I was told that through the means of connection, I could obtain an LLB degree and practice in the State of New Jersey, and if I decided to move, I could just sit for the bar and take the necessary steps and I could practice in any other state.

Question: And who told you this?

Witness: The salesman.

[4] *Question:* And what did you discuss with the salesman when he visited you?

Witness: I asked about the school; if I were successful in receiving an LLB degree, could I sit in the State of Rhode Island bar examination. It was at this time he told me that he didn't know about the basic requirements for the State of Rhode Island. All states had different requirements. But because I did hold a bachelor of science degree, coupled with a legally trained mind this course would give me, perhaps I could sit for the bar.

Question: After this discussion that you had with the salesman, what was your impression with respect to whether or not the LLB degree from LaSalle Extension University would satisfy the prerequisite legal educational requirements?

Witness: I felt that the educational requirements would be fulfilled, but that there might be some other requirements I might have to fulfill with the State of Rhode Island.

Question: What was your impression with respect to these other requirements?

Witness: Well, soundness of mind, moral character, residency in the State, the oath that you must practice after being successful, things of this nature.

* * * * *

Question: And what was your impression with respect to whether or not the LLB degree from LaSalle Extension University would satisfy the prerequisite legal requirements for sitting for the bar?

Witness: I felt that this education was sufficient to sit for the bar. Other requirements, other than educational requirements, might be pending.

[5] *Question:* Did you tell the salesman you were interested in pursuing a career in law?

Witness: Yes, I told him my purpose in taking the correspondence course

The Commission has recognized, in analogous situations, the ineffectiveness of affirmative disclosure relief or other traditional remedies where oral presentations are a major source of the deceptive practice sought to be cured. *See, e.g., In the Matter of Arthur Murray Studio of Washington, D.C., Inc., et al.*, Docket No. 8776, where the Commission prohibited respondent dance instructors from entering into contracts for dance instruction for an amount in excess of $1500. The Commission in that case agreed with the hearing examiner that an order without a $1500 contractual limitation would not "eradicate the root of the evil," and that such a provision "is a necessary and reasonable safeguard to forestall and stop in their incipiency the respondents' unfair and deceptive acts and practices before

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would be solely so that I could eventually be admitted to the bar association for the purposes of practicing law.

Question: Which state did you contemplate applying for membership in the bar if you took this course and obtained the degree?

Witness: I felt this had to be the state I would attempt to do this in, New Hampshire.

Question: Did you inquire about whether or not it would qualify you to practice law in those two states?

Witness: You mean of the salesman?

Question: Yes.

Witness: I asked him this question. He said that in Massachusetts it was not possible to qualify, to sit for the bar examinations in Massachusetts through correspondence training. However, he felt it was still possible to do so in New Hampshire, but that in a couple of years it might not be possible any longer. The standards might become more strict.

Question: Looking back on that incident now, do you have an opinion as to why he made this statement?

Witness: Yes. I feel he was emphasizing an element of urgency to me, indicating that I should enroll then in order to be permitted to sit for the bar examinations in New Hampshire. If I were to wait, it might possibly be too late.

• *Witness:* He [the Salesman] led me, or told me—we talked about sitting for the bar examination in North Carolina, that I could, upon getting a Bachelor of Law Degree, sit for the North Carolina Bar examination.

Question: Your testimony was that the salesman told you if you got a law degree you could sit for the bar. Was that a LaSalle Degree?

Witness: LaSalle Law Degree.

Question: And then you enrolled in this course?

Witness: I enrolled.

their purposes become fulfilled." Furthermore, it was determined that without such a provision, the order would not "effectively deter respondents" from engaging in deception. The Commission was clearly concerned with the enforceability of an order that did not contain the contractual limitation:

> "Since the selling practices involved here almost invariably take the form of oral representations made privately to a student, violations of an order addressed to such practices would be extremely difficult to discover and prove. In view of respondents' demonstrated proclivity to utilize such sales methods, we have no doubt that they would continue to use them if they believed they could do so without detection. They would, however, have considerably more difficulty circumventing an order which would prohibit them from entering into contracts in excess of $1500."

The instant case is like *Arthur Murray* in the sense that some prohibition on otherwise lawful conduct is a "necessary and reasonable safeguard" against continued deception, since the offer and conferral of degrees may be the principal prop or initial basis for the conveyance of misleading impressions by respondent's salesmen.

In favoring a ban on the offer or conferral of law degrees, I intend no derogation whatsoever with respect to the inherent value of respondent's course of instruction in law. I have no doubt that the education provided by respondent's courses can be of substantial benefit to many individuals in fields other than the actual practice of law. Since, however, the right to confer law degrees can be a source of deception, it should be proscribed in this case.

June 24, 1971

Appendix C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

Docket No. 5907

In the Matter of
LASALLE EXTENSION UNIVERSITY,
a corporation

Separate Opinion of Commissioner Jones

This matter arose on the Commision's order to respondent to show cause why the Commission's 1954 order against respondent should not be modified in two major respects:

> First, to require respondent to disclose the fact that the LL.B. curriculum which it offered is not recognized or accepted "as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law in any of the States in the United States or the District of Columbia," and
>
> Second, to prohibit respondent from conferring the LL.B. or any other law degree upon purchasers of respondent's courses of study and instruction in law.

After a full hearing and a substantial record, the Commission now comes to the anamalous conclusion that it will be sufficient protection for the public if respondent is required to disclose the fact that the legal curriculum which it is selling in no sense constitutes a legal education while at the same time it is permitted to promote this curriculum as enabling the prospective student to earn an LL.B. or equivalent law degree.

The Commission has determined that respondent's advertising is deceptive because respondent's courses do not amount to law training in the sense of the "minimum education and legal training requirements" of any state in the union. The record clearly supports this conclusion and I agree with the Commission's decision in this regard.

My difficulty arises with the Commission's conclusion that this deception can be cured by the single requirement that respondent disclose that "said courses are not recognized or accepted as sufficient education or legal training to qualify the student to become a candidate for admission to the profession of law in any of the states in the United States."

The deception sought to be eliminated here is of prospective students seeking to earn a law degree. We cannot know the variations in sophistication of the prospective students for respondent's courses. We have no reason to doubt that there may well be students who would like to enroll in a course of study involving the law, earn an LL.B. degree and never engage in the practice of law but simply work in jobs where their law training has been useful. As to these students, respondent's courses will provide exactly that and no more and no deception will exist as to them.[1]

It is a fair inference, however, that a substantial number of prospective students are interested in respondent's LL.B. curriculum because they are seeking to earn their living at the practice of law.

The question before us is whether these students will be protected from the deception which the Commission has found to inhere in respondent's promotional materials by

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[1] It can be questioned, however, whether there is not a serious deception inherent in holding oneself out as having earned an LL.B. degree under these circumstances. Employers or clients might be seriously misled. Thus respondent's practice of awarding degrees may in effect constitute the instrumentality for deceiving a much wider segment of the public than simply prospective students of respondent's courses. However, this possible deception was not raised during the proceedings and I am, therefore, not relying on it in my rationale for dissenting from the Commission's opinion here.

the disclaimer about the uselessness of respondent's courses in qualifying students to sit for a bar examination.

The entire thrust of respondent's promotional material consistently centered on the representation that its law school curriculum would provide the student with "law training" and the "LL.B. degree." We do not know—and this record is silent—on what "being a lawyer" means to all of the young prospective students who may be attracted to respondent's school because of its advertised law degree and law training.[2] We do not know whether the students interested in enrolling in respondent's law course are fully aware of the significance of the difference between taking a law course, being awarded an LL.B. degree and being admitted to the bar of a state in order to practice law. Thus the interrelationship or interchangeability between the terms "being a lawyer", "practicing law", "having an LL.B. degree", or "being admitted to practice" cannot be sharply defined by us. Clearly, if we are concerned with preventing prospective students from being deceived by respondent's law courses then it is wholly unrealistic for us to permit respondent to continue the bulk of its advertising about law diplomas, law degrees, LL.B. degrees, and the like and believe that all of the possible connotations which these terms will have for prospective students will be dissipated by a formal disclaimer about admission to the bar.

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[2] The record contains testimony principally by students who interpreted "being a lawyer" in terms of sitting for a state bar examination. We cannot conclude from this record—nor was any evidence introduced to support the proposition—that all prospective LaSalle students are aware of the need to take the bar examination in order to become a lawyer. Indeed since the principal point in issue on the liability phase of this hearing related to whether respondent's promotional materials—which make no express representations with respect to qualifying students to take a bar examination—in fact conveyed this notion and hence were false. Thus, it is likely the students selected to testify were those who had known of the bar requirements and were misled into believing from respondent's representations that its courses would qualify them. Testimony was not offered by students whose misconceptions might have been of a more generalized nature as to the capability of respondent's courses to enable them to become lawyers without any specific knowledge of the essentiality of taking a bar examination in order to practice law.

The disclaimer ordered here, in my judgment, constitutes only partial remedy for the broader deception generated by respondent's promotion of its LL.B. degree. Moreover, in my judgment the disclaimer in respondent's promotional materials when used in conjunction with the promotion of the LL.B. degree may itself be a source of additional confusion because of its basic inconsistency with the permitted representation of respondent that it awards an LL.B. degree. Even if the disclaimer or the inconsistency served to put a prospective student on notice and prompted him to make further inquiry, the extent to which his uncertainty and doubts will be correctly answered will depend on how he phrases whatever question he asks and to whom he directs his question.[3] If he asks "can I practice law with an LL.B. degree without being qualified to become a candidate for admission to the profession of law in any state", he will receive a proper answer and the significance of the disclaimer will be clear. But if he asks "can I practice law if I get an LL.B. degree", or "if I get an LL.B. degree can I practice Law", or finally "what do I have to do to be a lawyer", the answers which he gets back may concentrate on going to law school and getting a law degree rather than focusing on the next step which is to pass the bar exams. Since most lawyers eventually pass the bar, when asked about how to become lawyers, they will frequently think only in terms of going to law school. Thus the Commission can in no way be certain that the confusion engendered by respondent's "law training" and LL.B. degree will be dissipated by the disclaimer which relates simply to taking bar examinations.[4]

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[3] Several of the witnesses did make inquiry about respondent's courses, wrote to the American Bar Association and received full information about requirements to practice law. We cannot be certain, however, that all applicants will take this route.

[4] Several witnesses testified in support of the adequacy of the disclaimer although these witnesses were not asked whether in their judgment it would also be necessary or valuable to limit the promotion of the L.L.B. degree as well. One witness, the Executive Director of the State Bar of Wisconsin, did make this point. (Tr. 463, 465)

The Commission is fully empowered to require such relief as in its judgment will totally remove any possibility of deception flowing from a respondent's practices. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946). Moreover the Commission is fully authorized to direct the elimination of the source of the deception even if this would involve excission of trade names or trade marks. *FTC* v. *Army & Navy Trading Co.*, 88 F. 2d 776, 786 (D.C. Cir. 1937); *Bakers Franchise Corp.* v. *FTC*, 302 F. 2d 258 (3 Cir. 1962). The Commission's relief is not required to track precisely the exact form of the specific deception as it was established by the proof in the record. In the instant case the deception perpetrated here is respondent's misrepresentation that its course of study will enable students to practice law. The proof of the deception is the fact that respondent's graduates are not qualified to sit for any bar examination. In no sense is the Commission limited in its remedy to straightening out that particular fact or compelled to ignore the broader dimensions of the overall deception that respondent's graduates will not be able to practice law. The Commission is specifically authorized in its relief to close off all possible avenues of deception. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). Clearly the representation that completion of its courses will earn an LL.B. degree is such an avenue to the basic deception.

This Commission will have done a vain act if it rests its relief here solely on the unknown effect of a disclaimer and its hopes that the require disclaimer will in fact wholly and totally eliminate the confusion and deceptions caused by respondent's promotion of its LL.B. degree. Certainty of result is not always available to the Commission. Here, however, certainty is available. The Commission need only prohibit the source of the deception, namely the promotion of the LL.B. degree. When a remedy of this type is to hand, it disserves the public interest and wastes the resources of the Commission to settle for a halfway measure whose impact,

effect and capability to cure the deception has not been shown on this record.

In the instant case, the consequences of the slightest ambiguity or capacity of respondent's advertising to mislead are of the most serious kind. Young students who respond to respondent's advertising will invest both their funds—and more important—three years of their life in pursuing their life's career goal. If any confusion or misunderstanding is generated by respondent's advertising, it may not be until after the expiration of this period of time that students will discover that their financial investment has been for naught and that they are no nearer their career goal than when they started. This is the cruelest hoax of all. The Commission under these circumstances cannot risk even the slightest chance that its relief here will not be adequate to remove the deception. Nor is the risk of deception here slight. In my judgment, it is inevitable that some students will be misled unless the major source of the deception is eliminated. The Commission's relief must eliminate all references to any LL.B. or equivalent degree. Any relief short of this will be wholly inadequate.

June 24, 1971

APPENDIX D

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58

of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

REVIEW OF ORDER; REHEARING

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of

the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so

taken, and it shall file such modified or new findings, which if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

JURISDICTION OF COURT

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

* * *

FINALITY OF ORDER

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such

Court directs that the order of the Commission be affirmed or the petition for review dismissed.

SAME; ORDER MODIFIED OR SET ASIDE BY SUPREME COURT

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

SAME; ORDER MODIFIED OR SET ASIDE BY COURT OF APPEALS

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

SAME; REHEARING UPON ORDER OR REMAND

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been

duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

DEFINITION OF MANDATE

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

PENALTY FOR VIOLATION OF ORDER

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

APPENDIX E

§ 556. HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS OF DECISION

• • •

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Publ.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1230

LA SALLE EXTENSION UNIVERSITY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-6) is unreported. The order and opinion of the Federal Trade Commission (Pet. App. A9-31) are not yet officially reported.

JURISDICTION

The order of the court of appeals was entered on October 23, 1973. A petition for rehearing was de-

nied by the court of appeals on November 14, 1973. The petition for a writ of certiorari was filed on February 11, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission acted within the scope of its remedial jurisdiction in specifying type-size and frequency requirements for the affirmative disclosure provision in an order designed to offset deception resulting from the offering of courses of study in law by a correspondence school.

2. Whether, on petition for review, the court of appeals should have considered the school's contention, not raised before the Commission, that the order is overly broad because it applies to the school's specialized law courses as well as its generalized courses of study in law.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended (15 U.S.C. 45) is set forth at Pet. App. A33-38.

STATEMENT

Petitioner ("La Salle") seeks review of a decision by the court of appeals affirming a modification by the Federal Trade Commission ("Commission") of a prior order of the Commission.

La Salle is an Illinois proprietary corporation which operates a correspondence school selling courses

of study and instruction in law and other subjects (App.-1, 67).[1] It offers generalized law courses of three and four years' duration, which until recently led to the conferral of an L.L.B. degree (Pet. 5). Petitioner also offers individual law courses in subjects such as contracts, real estate and insurance, and a hybrid course entitled "First Year Law" (App.-2-A, 179, 181, 289-310; and App.-2-B, 625-626).

In 1954, after full administrative proceedings, the Commission entered a cease and desist order against La Salle, which prohibited La Salle from representing that recipients of its degrees in law or others completing its course of correspondence study will be admitted to or are eligible to participate in bar examinations, unless such representations are expressly limited to specified states where the training requirements are fulfilled solely by completion of a correspondence course of legal study. *La Salle Extension University*, 50 F.T.C. 1083, 1087. The order was based on a finding that, as of 1950, only Montana, Mississippi, Georgia and California accepted correspondence study for bar examination purposes. *Id.* at 1086. Subsequent to the effective date of the 1954 order, however, the rules and laws governing admission to the bar in these four states were modified so that as of 1970 no state, except California under certain circumstances (see App.-1, 24-25), accepted petitioner's courses or degree as sufficient legal edu-

[1] "App." references are to the joint appendix in the court of appeals, consisting of volumes 1, 2-A, 2-B, and 2-C; copies of which we are lodging with the Clerk.

cation or training to qualify a student to take the bar examination (App.-1, 15).

On January 19, 1970, the Commission issued an order to show cause (App.-1, 14) why the 1954 cease and desist order against petitioner should not be reopened, altered and modified pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45 (b). The show cause order set forth an altered and modified cease and desist order which the Commission proposed to issue. It (1) required affirmative disclosure that La Salle's law courses are insufficient education or legal training for purposes of taking a bar examination—with specific type-size and frequency requirements—and (2) prohibited La Salle from offering a law degree (App.-1, 16).

Petitioner answered the order to show cause, opposed the proposed order and requested a hearing (App.-1, 19). At the hearing, numerous witnesses testified that it was their impression on reading La Salle's advertisement that they would be able to take the bar examination or practice law in their respective states upon completing petitioner's law course (App.-1, 24). The hearing examiner found that La Salle's advertisements failed to disclose fully and conspicuously that completion of its course does not qualify anyone to take a bar examination (App.-1, 23-24). He concluded that petitioner's advertising and promotional materials have the tendency and capacity to deceive (App.-1, 27-28). Accordingly, the examiner recommended that the Commission adopt the affirmative disclosure provision of the proposed

order, but recommended against prohibiting La Salle from offering a law degree (App.-1, 28-29).

On cross-exceptions to the Commission, La Salle argued that the type-size and frequency requirements of the affirmative disclosure provisions were "unnecessary and unreasonable" (App.-1, 34-39). With that exception, however, La Salle said it was "concurring in general with the recomended order * * *" (App.-1, 33-34).

The Commission upheld the hearing examiner's determination (Pet. App. A9-20). "Where, as here, the mere offering of the product or service leads to a deception (without further affirmative claims)," the Commission explained, "we believe that it is reasonable and necessary to demand that a disclosure required to dispel the deception be given equal prominence with the offer" (Pet. App. A15-16).[2]

On La Salle's petition for review, the court of appeals affirmed (Pet. App. A1-6). It held that the type-size and frequency requirements were not "outside the range of reasonableness" (Pet. App. A4-5). In response to petitioner's offer to abandon its offering of a law degree (made after the case was pending in the court of appeals), the court reasoned (Pet. App. A3):

> Dropping the references to a law degree would,

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[2] Two of the five members of the Commission, Chairman Kirkpatrick and Commissioner Jones, filed separate opinions. Concurring in the affirmative disclosure requirement of the order, they would also have prohibited the offering of an L.L.B. degree (Pet. App. A21-31).

> we think, change the tone very little. We are far from able to say, as a matter of law, that the probability of misunderstanding would be materially reduced if there were no promise of a degree. The two commissioners who felt that dropping the degree should be part of the solution, supported the requirement of disclosure in any event.

The court declined to consider La Salle's argument that the order is overly broad in its application to petitioner's specialized as well as generalized law courses on the ground that La Salle had "raised no such question before the Commission" (Pet. App. A6).[3]

ARGUMENT

The decision below is correct and presents no question of general importance warranting review by this Court.

1. La Salle challenges the requirements of the Commission's order (Pet. App. A10) that the requisite affirmative disclosure be made

> in type the same size and appearance as [petitioner's] advertising claims appearing thereon (a) in any advertisement of written offer to sell; (b) on the front page or cover of promotional material or descriptive brochure wherein [peti-

[3] The court noted that "the [Commission] proceeding was mainly directed at promotion of the general courses," but it recognized "the difficulty of making a distinction in the order, valid in the future as well as presently, between offerings where deception with respect to eligibility for bar admission will be a problem and those where it will not" (Pet. App. A6).

> tioner's] law courses or law degrees are mentioned and in said promotional material or descriptive brochure on each page on which [petitioner's] law courses or law degrees are mentioned; (c) in each enrollment form, application form, sales contract or similar document * * *.

The deception to be prevented in the present case is serious. As Commissioner Jones in her opinion stated (Pet. App. A31):

> Young students who respond to [petitioner's] advertising will invest both their funds—and more important—three years of their life in pursuing their life's career goal. If any confusion or misunderstanding is generated by [petitioner's] advertising, it may not be until after the expiration of this period of time that students will discover that their financial investment has been for naught and that they are no nearer their career goal than when they started. This is the cruelest hoax of all. * * *

To minimize the risk of such deception, the Commission ordered affirmative disclosure with specific type-size and frequency requirements.[4]

The Commission found that the mere offering of La Salle's law courses, without further affirmative claims, had led to deception (Pet. App. A15). Based

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[4] Such an order is not unprecedented. See *Parker Pen Co.* v. *Federal Trade Commission*, 159 F.2d 509, 512 (C.A. 7); *Gimbel Bros., Inc.* v. *Federal Trade Commission*, 116 F.2d 578, 580 (C.A. 2). In any event, a particular remedy is not invalid because in other cases involving a similar problem the agency has selected narrower relief. Cf. *Butz* v. *Glover Livestock Comm'n Co.*, 411 U.S. 182, 187.

on this finding, the Commission ordered affirmative disclosure in type of the same size and appearance as petitioner's advertising claims.[5] The Commission explained (Pet. App. A16):

> Surely a prospective purchaser is entitled to be informed that the course will not qualify him to take the bar examination in letters equally as large as the letters which we find, on the basis of the record, convey this meaning.

Similarly, the Commission ordered affirmative disclosure on each page where La Salle's law courses are mentioned to protect "not only the most careful and intelligent buyers, but also the 'ignorant, the unthinking and the credulous' who may base their decision to purchase on a cursory perusal of the literature at hand. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 679 (2nd Cir. 1944)" (Pet. App. A18). Some purchasers may not read every page of petitioner's promotional literature, the Commission found, and any page may induce purchase of petitioner's course (Pet. App. A18).[6]

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[5] The order does not require La Salle "to carry the disclaimer in [type] the same size as the largest *heading* appearing on each page * * *" (Pet. 9) (emphasis added). See Opinion of the Commission (Pet. App. A16, n. 1). In this regard, petitioner misconstrues (Pet. 9-10) the advice of the Commission's Compliance Division (App.-2-C, 1070-1075).

[6] Another reason for the Commission's specification of type-size and frequency requirements for written affirmative disclosure was to help offset deceptive oral representations by petitioner's salesmen. See Opinion of the Commission (Pet. App. A19-20).

This Court has recognized that the Commission has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and has stated that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613.[7] In the present case, the type-size and frequency requirements specified by the Commission are reasonably related to the violations found. Although the order may require La Salle to alter the layout of its advertisements,[8] the Commission properly determined that remedy to be "necessary to eliminate the unfair or deceptive trade practices which have been disclosed." *Id.* at 612.

2. Petitioner's belated argument concerning application of the order to its specialized law courses was properly rejected by the court of appeals.

(a) Without specifying the particular language about which it is concerned, petitioner contends that the disclosure requirements of the order unjustifiably

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[7] See also *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-475; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395.

[8] The Commission found that advertising layouts rarely, if ever, constitute a valuable business asset (Pet. App. A16). Moreover, the Commission noted "that if there is no way to present the claim in a particular medium without making a false representation, the seller must abandon the use of that medium," citing *Federal Trade Commission* v. *Colgate-Palmolive Co.*, *supra*, n. 7 (Pet. App. A16).

apply not only to general law study leading to an L.L.B. degree but also to individual and specialized non-degree law courses (Pet. 11). With respect to its failure to make this objection before the Commission, petitioner states that "[t]he determination that the Commission's order required a disclaimer as to courses which were not related to general law study introduced an element of surprise so far as the issues had been delineated and tried before the Hearing Examiner" (Pet. 14), and intimates that this objection did not arise until the matter was "presented for compliance to the Agency staff" (Pet. 13). The record, however, does not support petitioner's suggestion of a belatedly discovered "surprise" interpretation of the order.

Language in two portions of the order provided petitioner with ample notice of the application of the order to petitioner's individual non-degree law courses: (1) the references to LaSalle's "courses of study in law," in connection with all advertising and promotion of which the required disclosures must be made, or (2) the reference to LaSalle's "law courses" as to which mention is made in promotional material or descriptive brochures (as distinguished from advertisements and forms, contracts or similar documents) (Pet. App. A10). Petitioner does not contend that the term "law course" has a narrower meaning than the term "course of study." Nor is it in a position to do so on this record.*

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* As the examiner's decision noted, petitioner's promotional materials have at times used the term "law courses" to en-

In any event, as to neither portion of the order is petitioner in a position to complain. Petitioner's "courses of study in law" were referred to not only in the order finally adopted by the Commission, but also in the Commission's show cause order (App.-1, 15) and proposed modified order (App.-1, 16), and the examiner's recommended order (App.-1, 29). The reference to "law courses" was also included in the examiner's recommended order (*ibid.*) as well as in the Commission's final order.

Moreover, although the examiner's recommended order did not limit its references to LaSalle's "courses of study in law" or "law courses" to those that led to a degree, petitioner made no objection to the Commission as to its scope (App.-1, 30-42), explicitly concurred in that order (with exceptions not presently relevant, see p. 4, *supra*), and, as the court of appeals noted (Pet. App. A6), even included the identical language in its proposed order submitted to the Commission (App.-1, 40).

After the Commission's decision adopting the recommended order of the examiner, petitioner had at least two procedures available under the Commission's regulations whereby it could have presented to the Commission its belated claims concerning application of the order to its non-degree law courses. It could have sought reconsideration of the Commission's decision (based upon "new questions raised by

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brace both its course of study in law leading to an LL.B. degree and its individual non-degree courses (App.-1, 21; see, *e.g.*, CX 40, 78, App.-2-A, 131, 317).

the decision or final order and upon which the petitioner had no opportunity to argue before the Commission" (16 C.F.R. 3.55)), or it could have requested that the proceedings be reopened and the order modified, in the "public interest" or because of "changed conditions of fact or law" (16 C.F.R. 3.71, 3.72)." Petitioner chose, however, to by-pass the Commission entirely on this issue and raised it for the first time in its brief in the court of appeals.

Under the circumstances, the court of appeals properly concluded that petitioner had presented no grounds that would justify the court in setting aside the order upon a ground not raised before the Commission (Pet. App. A6). See, *e.g.*, *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 35-37; *Moog Indus., Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414.[11] All the bases for petitioner's argument have existed at least since the examiner issued his recommended order, and petitioner has failed to

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[10] Petitioner could also have sought advice from the Commission as to whether a proposed course of action concerning its individual law courses would be in compliance with the order (16 C.F.R. 3.61(d)), if it had any legitimate doubts in that regard.

[11] *Hormel* v. *Helvering*, 312 U.S. 552, relied upon by petitioner (Pet. 14), is distinguishable, as that case involved exceptional circumstances warranting consideration on appeal of an issue not raised before the agency. In *Hormel*, subsequent to the administrative determination but prior to appeal, there had been an intervening decision by this Court interpreting existing law. Application of the new interpretation in *Hormel* materially altered the result.

excuse or justify the belated nature of its attack upon the order.[12]

(b) Petitioner's belated attack on the Commission's order is, in any event, without merit. Among the law courses presently offered by petitioner or among any new law courses which it may offer in the future, there can be no certainty as to which, in its promotional setting, might lead to deception respecting eligibility to take a bar examination.[13] For example, one of the Commission's witnesses testified that after expressing an interest in petitioner's courses in law for police officers and accounting, he was misled into signing up for the L.L.B. course of study in law on the understanding that he would be eligible to take the bar examination (App.-1, 86-91).

As this Court declared in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473:

> [T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has

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[12] Although petitioner contends that some of its concern about other aspects of the order developed in post-order compliance communications with the Commission's staff (see Pet. 7, 9-10), no such contention is made as to the application of the order to single non-degree law courses.

[13] On exceptions to the Commission, La Salle argued successfully, in opposition to the proposed degree-prohibition provision, that the L.L.B. degree was not the principal source of deception. The "confusion," petitioner asserted, was attributable to "[m]any different factors" (App.-1, 47, 51).

traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity. * * * [Footnote omitted.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

LEE I. WEINTRAUB,
Attorney.

CALVIN J. COLLIER,
General Counsel,

GERALD HARWOOD,
Acting Assistant General Counsel,
Federal Trade Commission.

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